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**Lloyd Duest v. State of Florida**

**SC03-1241**

THE NEXT CASE ON THE COURT'S DOCKET IS DEUST VERSUS STATE OF FLORIDA.

>> READY TO PROCEED.

>> MAY IT PLEASE THE COURT, TODD SCHER ON BEHALF OF LLOYD DEUST, THE APPELLANT ON A DENIAL OF A 348.1 MOTION, FOLLOWING AN --

>> LET'S TALK ABOUT THE LIMITED PART, BECAUSE I THINK YOU HAVE -- HAS TO BE CLEARED UP.

IT IS CLEAR THAT THE TRIAL COURT SAID YOU CAN HAVE AN EVIDENTIARY HEARING RELATED TO DR. WRIGHT AND THE SUB ISSUES RELATED TO DR. WRIGHT AND YOU ARE CLAIMING OR CLAIMED IN YOUR BRIEF THAT YOU WERE ONLY ALLOWED TO GO INTO THE INEFFECTIVE ASSISTANCE, THAT IS WHETHER, ONCE THE DEFENSE LAWYER KNEW THAT DR. WRIGHT COMING OUT WITH NEW TESTIMONY WOULD YOU THE -- ABOUT THE LENGTH OF TIME WHETHER YOU SHOULD HAVE -- LENGTH OF TIME WHETHER HE SHOULD HAVE OBJECT AND REQUEST AID RICHARDSON HEARING.

AND I SEE HOW IT COULD BE -- A LITTLE CONFUSED, AS TO WHAT THE SCOPE OF THE HEARING WAS, BUT WHAT I WANT TO UNDERSTAND FROM YOU, MR. SCHER AS AN EXPERIENCED LAWYER AND OFFICER OF THE COURT, WHEN YOU GOT INTO THAT HEARING AND DR. WRIGHT IS ON THE STAND -- PUT THIS DEFENSE LAWYER ON.

>> CORRECT.

>> OKAY.

DID YOU TRY TO PUT ON THE STATE TO ANYONE -- ANYONE FROM THE STATE TO TALK ABOUT WHEN THEY MIGHT HAVE FIRST KNOWN ABOUT THE, QUOTED, CHANGE IN TESTIMONY, OR DID YOU TRY AND PUT ON DR. WRIGHT TO TALK ABOUT

WHEN HE HAD -- YOU KNOW, WHEN HE  
-- IF AT ALL, NOTIFIED THE STATE  
OF THIS CHANGE?

DID YOU PROFFER THAT, ANYTHING  
LIKE THAT?

>> NO, WE CERTAINLY HAD MADE  
THOSE --

>> I GUESS WHAT I AM CONCERNED  
ABOUT, BECAUSE YOU ARE ASKING,  
LET'S GO BACK FOR ANOTHER  
EVIDENTIARY HEARING ON THAT  
PART.

I DON'T -- YOU KNOW, IT SEEMS TO  
ME THAT IF THERE WAS A  
MISUNDERSTANDING, WHICH IT MAY  
HAVE BEEN, ABOUT HOW FAR YOU  
COULD GO, YOU ARE NOT SHY ABOUT  
SAYING, WELL, AT THE TIME THAT  
EVIDENTIARY HEARING IS BEING  
GRANTED, YOUR HONOR, WE ALSO  
HAVE, YOU KNOW, WAS IT DONE IN  
BROWARD.

>> YES.

>> YOU KNOW, DR. WRIGHT, I GUESS  
IS STILL DOWN THERE.

I MEAN --.

>> I DON'T KNOW, I BELIEVE SO.

>> WHEREVER HE IS, THE STATE,  
YOU HAVE THE PROSECUTOR TO SAY  
WE'D LIKE TO PUT ON WITNESSES  
FROM THE STATE OR DR. WRIGHT, TO  
TALK ABOUT WHEN IT WAS THEY  
FIRST KNEW ABOUT THE CHANGE OF  
TESTIMONY.

>> CERTAINLY, I UNDERSTAND.  
BUT, I WAS FOLLOWING -- I MEAN,  
IF YOU LOOK AT THE COURT'S CASE  
MANAGEMENT ORDER, IT  
SPECIFICALLY REFERS TO THE FACT  
THAT THE HEARING SOLELY RELATED  
TO THE INEFFECTIVE ASSISTANCE OF  
COUNSEL ALLEGATIONS REGARDING  
THE FAILURE TO OBJECT TO THE  
RICHARDSON VIOLATIONS.

>> YOU NO, I THINK YOU CAN READ  
IT BOTH WAYS AND AS I SAID I  
THINK YOU WILL BE -- THERE  
WASN'T ANY COLLOQUY TO SAY, BUT  
JUDGE WE'LL HAVE -- COLLOQUY TO  
SAY, JUDGE IF WE'RE GETTING ON  
THE ISSUE, THE SAME QUESTIONS  
ARE -- NEED TO BE EXPLORED, THE  
-- YOU KNOW, THE SUPREME COURT  
SAID SO, SO, LET'S ASSUME,

THOUGH, THAT SOMEHOW -- ARE YOU REPRESENTING IF WE WERE, SAY, TO RELINQUISH TO ALLOW THE BRADY PART TO BE -- TO EXPLORE, YOU COULD PUT ON TESTIMONY, FROM THE STATE, OR DR. WRIGHT, ABOUT WHEN THEY FIRST KNEW ABOUT THE CHANGE?

>> YES.

AND THERE ARE TWO PARTS TO MY ANSWER, FIRST OF ALL, THINK BRAID ALLEGATIONS WENT NOT ONLY REALLY TO THE RESENTENCING BUT, MORE PARTICULARLY TO THE ORIGINAL CONVICTION.

>> BUT ON THE ORIGINAL CONVICTION YOU COULD SAY THAT THAT WAS -- I THOUGHT YOU WERE RAISING THAT AS NEWLY DISCOVERED EVIDENCE.

>> WELL, BOTH.

ALSO, ALSO, IT WAS RAISED ON THE BRADY CLAIM IN TERMS OF THE ORIGINAL CONVICTION.

BUT IN THE 3051 MOTION WHAT WAS ALLEGED WITH SUPPORTING DOCUMENTATION WERE DOCUMENTS I DISCOVERED WHEN I WAS GOING THROUGH THE CHAPTER 119 PRODUCTION PRIOR TO FILING WHICH INCLUDED, FOR EXAMPLE, THE FACT THAT PRIOR TO DR. WRIGHT'S TESTIMONY, AT THE RESENTENCING, THE DAY BEFORE THE STATE HAD REQUESTED TO LOOK AT THE MEDICAL EXAMINER'S FILE.

AND IN THAT FILE, THERE WERE DOCUMENTATION OF COMMUNICATIONS BETWEEN DR. WRIGHT AND THE PROSECUTOR, INCLUDING A SCRIPT OF QUESTIONS, THAT DR. WRIGHT SUGGESTED.

>> RIGHT.

AND YOU MENTIONED THAT IN YOUR BRIEF BUT I GUESS WHAT I WAS CONCERNED ABOUT, YOU WOULD THEN, YOUR IDEAS -- IDEA WAS YOU WOULD PUT ON DR. WRIGHT, AND THE PROSECUTOR TO TALK ABOUT THAT?

>> AMONG OTHER PEOPLE, CORRECT.

>> BUT I GUESS, YOU -- IT SEEMS TO ME, I'M JUST CONCERNED, THAT THERE WAS NO PROFFER TO SAY AT THE TIME THE EVIDENTIARY HEARING

WAS -- ABOUT TO BEGIN, YOUR HONOR, I WANT TO AGAIN JUST, YOU KNOW, I'M NOT CLEAR THAT YOUR ORDER LIMIT US.

WE DO HAVE THE PROSECUTOR, WE HAVE DEPOSED THESE PEOPLE, WHATEVER IT IS, THAT NEVER HAPPENED?

>> WELL,.

>> IT DIDN'T HAPPEN.

>> IT DIDN'T HAM.

I MEAN, BUT I DON'T THINK -- I KNOW AUTOMOTIVE NO REQUIREMENT. BULLS --

>> I WANT TO KNOW -- LET'S GO, LET'S --

>> I WANT TO POINT OUT AT THE REHEARING I POINTED THIS OUT AND AT THAT POINT WHEN THE COURT SAID, WELL, THE HEARING WASN'T LIMITED, BUT, AS AN ATTORNEY, WHEN I'M PREPARING FOR A HEARING I'M LOOKING AT, YOU KNOW, THE JUDGE WENT ON AND -- SEVERAL TIMES, IN THE PARTICULAR ORDER, LIMITING THE HEARING TO THIS ONE PARTICULAR ISSUE.

>> LET'S GO OVER NOW, BECAUSE THIS IS -- THERE IS LOOK A THREE PRONGED ISSUE ON DR. WRIGHT. ONE WOULD BE, BRADY, SHOULD HAVE BEEN DISCLOSED, BEFORE WHENEVER THEY KNEW, BUT WE DON'T KNOW AT THIS POINT WHEN IT WAS KNOWN. BUT IF THERE WAS A CHANGE IN TESTIMONY UNDER CPO, PROBABLY -- YOU KNOW, SHOULD HAVE LET YOU KNOW AHEAD OF TIME.

NOW WE GO TO HOW IT WOULD HAVE UNDERMINED CONFIDENCE IN THE PENALTY PHASE.

WE'LL START WITH THAT.

WELL, MR. -- YOU KNOW, THE FACT IS, THE WAY I SEE IT, OF COURSE THE NEW TESTIMONY HELPED SIGNIFICANTLY, THE DEFENSE. YOU REFER TO IT AS BEING HIGHLY EXCULPATORY.

>> YES.

EXCULPATORY AFTER THE TRIAL BUT YES, I UNDERSTAND.

>> THERE YOU HAVE NOW, HE'S NOW GIVING -- IN RESPONSE TO CROSS-EXAMINATION, HIGHLY

EXCULPATORY TO EVIDENCE, YOUR LAWYER IS EXTREMELY PREPARED. MARTY McCLAIN IS IN THE ROOM AND EXTREMELY PREPARED FOR WHAT HE HAD SAID BEFORE AND SO HE DOES AN EXCELLENT CROSS-EXAMINATION. WELL, THIS IS -- YOU DIDN'T SAY THIS BACK IN 1983, AND, BASICALLY, CROSS EXAMINES HIM AND THEN, USES THE NEW REALLY GOOD EVIDENCE TO HIS ADVANTAGE, TO SAY, WELL, YOU KNOW, THIS GUY COULD HAVE ASKED FOR, YOU KNOW, SORT OF KIND OF IN THIS CATEGORY OF, WELL, I'M NOT SURE WHAT IT IS, BUT, YOU KNOW, HE COULD HAVE SAVED HIMSELF. SO, WITH THAT IN MIND, AND WE -- HOW DOES THIS PENALTY PHASE, SINCE IT WASN'T -- IT WAS KNOWN AT THE TIME OF THE PENALTY PHASE, THERE IS NO SHOWING THAT DEPOSING WRIGHT WOULD HAVE GIVEN HIM A -- YOU KNOW, COULD HAVE DONE A BETTER JOB, HE DOESN'T SAY HE COULD HAVE DONE A BETTER JOB IF HE COULD HAVE JUST DEPOSED HIM, HOW DOES IT UNDERMINE OUR CONFIDENCE IN THE OUTCOME OF THIS PENALTY PHASE. >> OBJECTIONS. WHEN I DISCUSSED THE FACT THAT THE NEW VERSION OF THE WAY IN WHICH THE VICTIM DIED WAS EXCULPATORY I'M REFERRING TO THE FACT THAT IT IS EXCULPATORY AS TO THE CONVICTION. I DON'T THINK IT WAS CERTAINLY -- AND THAT WAS THE PROBLEM WHEN IT AROSE AT THE PENALTY PHASE, BECAUSE, IN TERMS OF HAC AND AT THAT POINT THE STATE WAS STILL ARGUING CCP, AT THE RESENTENCING, THE FACT THAT THE VICTIM LIVED FOR MUCH LONGER IN FACT WAS FAR MORE -- MUCH LONGER IN FACT WAS MORE HARMFUL TO THE DEFENSE IN TERMS OF CCP AND HAC THOUGH THE COURT LATER DID NOT FIND CCP. >> OKAY. AND EITHER WAY, THOUGH, HAC GETS ESTABLISHED BY THE NUMBER OF THE -- I MEAN, THERE WERE KNIFE

WOUNDS AND, YOU KNOW, THAT IS WHY I SAID THE FACT HE LIVES LONGER, BUT NOW YOU GO BACK TO, LATTER CONCENTRATE AND GO BACK AND SAY, ON THE GILL PHASE AND ASSUMING THERE IS NO PROCEDURAL BAR BECAUSE I'M STILL TRYING TO CALCULATE WHEN IT SHOULD HAVE BEEN BROUGHT.

BUT, LET'S JUST ASSUME THOSE PROCEDURAL BARS AND NOW YOU'VE GOT, FIRST OF ALL, THEY DIDN'T -- IT IS PRETTY CLEAR TO ME, AT LEAST, AND YOU SAY NO, I COULD ESTABLISH THEY KNEW ABOUT IT AT THE TIME OF THE GUILT PHASE BUT THAT MAKES NO SENSE BECAUSE HE TESTIFIED IN THE PENALTY PHASE, ORIGINALLY, SO THEY DIDN'T KNOW IT, AND JUST, YOU KNOW, UNTIL AFTER, SOMETIME AFTER THE CONVICTION IS FINAL, SO IT IS NEWLY DISCOVERED EVIDENCE. AND UNDER NEWLY DISCOVERED EVIDENCE, WHAT IS IT THAT WOULD SHOW A PROBABILITY OF AN ACQUITTAL?

HOW DOES IT SHOW ANYTHING ABOUT HIS PREMEDITATED MURDER, HIS INTENT TO KILL, HIS STATEMENTS THAT HE IS GOING TO, YOU KNOW, ROLL A FAG OR WHATEVER YOU KNOW

--

I MEAN, HE USES THOSE WORDS I THINK.

>> RIGHT.

>> I DON'T UNDERSTAND IT.

TELL ME HOW IT -- YOU WOULD HAVE ANOTHER TRIAL AND USE DR. WRIGHT AND YOU DON'T YOU KNOW -- THERE IS A PROBABILITY OF AN ACQUITTAL?

>> WELL, THERE ARE A NUMBER OF THINGS.

FIRST OF ALL, I DON'T AGREE THAT THE DR. WRIGHT INFORMATION IS SOLELY NEWLY DISCOVERED.

I THINK AN ASPECT OF IT IS BRADY, BECAUSE IF YOU REMEMBER, DR. WRIGHT'S CLAIM TO HIS TESTIMONY CHANGED BECAUSE HE REVIEWED HIS DEPOSITIONS AND ALSO HAD A LOOK AT CRIME SCENE PHOTOS WHICH APPARENTLY HE

NEGLECTED TO DO THE FIRST TIME  
AND SO, IT IS ALSO INFORMATION  
THAT COULD GIVE RISE TO AN  
ARGUMENT AT LEAST, THAT THE  
MEDICAL EXAMINER WAS JUST  
COMPLETELY INCOMPETENT THE FIRST  
TIME AROUND WHEN HE GAVE HIS  
OPINIONS BUT BE THAT AS IT MAY

--

>> I'M SAYING, BRADY... IT  
WOULD HAVE BEEN -- HOW DID HE  
DISCLOSE AT THE GUILT PHASE.

>> CORRECT.

WELL, IT SHOULD HAVE BEEN -- I  
SUBMIT THAT THE FACT THAT THE  
MEDICAL EXAMINER CONDUCTED AN  
INCOMPETENT EXAMINATION, AND  
DIDN'T LOOK AT THE CRIME SCENE  
PHOTOGRAPHS WHEN HE HAD BEEN TO  
THE CRIME SCENE IS RESULTING IN  
THE SUBSEQUENT CHANGED TESTIMONY  
IS INFORMATION THE STATE BEARS  
THE BURDEN OF --

>> YOUR -- I THOUGHT YOUR  
ARGUMENT WAS BECAUSE OF THE  
CHANGED LENT OF TIME THAT THIS  
DEFENSE -- THIS VICTIM LIVED,  
THAT IT WOULD DEMONSTRATE, IF  
YOUR CLIENT DID NOT HAVE THE  
INTENT TO KILL HIM, AND THE MAN  
WOULD HAVE SURVIVED, BUT FOR THE  
FACT THAT HE DIDN'T, AS SOON AS  
THE DEFENDANT LEFT, GET UP AND  
GO CALL 911.

BASICALLY.

>> THAT'S CORRECT.

IT CHANGES THE WAY IN WHICH THE  
CRIME TOOLS.

AND WHAT IS IMPORTANT TO  
RECOGNIZE HERE, IS THAT --ED.

>> THAT IS WHAT I'M STRUGGLING  
WITH, IS HOW DID IT DO THAT?  
THIS MAN WAS STABBED MULTIPLE  
TIMES.

SO NOW WE ARE PUTTING THE ONUS  
ON THE VICTIM TO TRY TO SAVE  
HIMSELF.

>> NO.

WHAT THE ARGUMENT IS, THAT THE  
STATE PRESENTED THE CASE AT THIS  
FIRST TRIAL, WHICH IS THAT  
MR. DEUST AND HIS PREMEDITATED  
FASHION STABBED THE VICTIM IN  
THE BED AND FOLLOWED HIM INTO

THE BATHROOM AND FINISHED HIM OFF AND HERE WE HAVE A DIFFERENT SCENARIO WHERE THERE WAS OBVIOUSLY WHAT TOOK PLACE TOOK PLACE IN THE BED, THE ASSAILANT LEFT, AND THE VICTIM WAS STILL ALIVE AND THAT PUTS THE --

>> IT DOESN'T CHANGE, EITHER SCENARIO, DOESN'T CHANGE THE FACT THAT THIS DEFENDANT STABBED THE PERSON MULTIPLE TIMES, CORRECT.

>> WELL, I SUBMIT THAT IT -- WOULD --

>> I'M TRYING TAKE IT APART. PIECE BY PIECE, DOES IT CHANGE THE FACT THAT THIS DEFENDANT STABBED THE VICTIM.

>> IT DOESN'T CHANGE THE FACT AND CERTAINLY IN TERMS OF THE NUMBER OF STAB WOUNDS, WHAT I'M SUGGESTING --

>> DOES IT CHANGE THE FACT THAT THIS DEFENDANT DIED -- VICTIM DIED OF THOSE STAB WOUNDS?

>> NO.

WHAT I'M SUGGESTING IS THAT IT GOES TO YOUR USE OF THE TERM, "THIS DEFENDANT" BECAUSE THERE WAS A DEFENSE PRESENTED IN THE CASE IN TERMS OF AN ALIBI DEFENSE.

AND, THE STATE CHARGED MR. DEUST WITH PREMEDITATED MURDER, NO CHARGE FOR THE UNDERLYING FELONY HERE AND SO WHAT I'M SUGGESTING IS THAT ALONG WITH THE OTHER EVIDENCE THAT ALREADY WAS SUPPRESSED, COURTS HAVE FOUND TO HAVE BEEN SUPPRESSED INCLUDING THIS COURT, THE CUMULATIVE EFFECTIVENESS SHOULD HAVE WARRANT AT LEAST THE HEARING SO WE COULD GET THE TRIAL ATTORNEY ON THE STAND IN ORDER TO BE ABLE TO ALLOW THE TRIAL ATTORNEY TO EXPLAIN HOW IN FACT THE INFORMATION WOULD HAVE BEEN USEFUL TO HIM, AS THE ATTORNEY DOING THE GUILT PHASE AND, ALSO, ONE OF THE CHIEF COMPLAIN, ONE OF THE MANY COMPLAINT I HAVE, WITH REGARD TO THE WAY THE LOWER COURT RESOLVED THIS WAS THERE

WAS NO CUMULATIVE ANALYSIS.

>> WELL, AND GO BACK TO THE BEGINNING OF THIS, IS WHEN DO YOU ALLEGE OR WHEN -- WHAT DID YOU DEMONSTRATE AS TO WHEN THE STATE KNEW DR. WRIGHT -- WRIGHT'S TESTIMONY WAS GOING TO BE DIFFERENT.

>> ALL WE KNOW IS THAT THE FIRST TIME -- DR. WRIGHT TESTIFIED ON A WEDNESDAY, HIS DIRECT EXAMINATION TOOK PLACE ON A WEDNESDAY.

THE END OF THAT DAY, THE CROSS-EXAMINATION WAS SET TO BEGIN THE NEXT DAY AND THERE WAS A -- THAT WAS A WEDNESDAY, THURSDAY, FRIDAY, THERE WAS A REPORT, I THINK A STORM OR HURRICANE OR SOMETHING, SO, COURT BEGAN THE FOLLOWING MONDAY, AND IT WAS DURING THE CROSS-EXAMINATION, WHERE THE NEW INFORMATION FIRST CAME TO LIGHT. WHAT WE --

>> THAT STILL DOESN'T ANSWER THE QUESTION, AS TO WHEN THE STATE KNEW THAT THIS WAS -- THERE WAS GOING TO BE A DIFFERENT INFORMATION BROUGHT OUT, ON CROSS-EXAMINATION.

IT SEEMS TO ME THAT THAT IS THE FIRST HURDLE YOU HAVE TO GET THROUGH -- IN ORDER TO HAVE A BRADY CLAIM.

THEY HAVE TO KNOW NIGHT I AGREE, WE DRIBBLE GET THE HEARING ON IT.

WE DIDN'T GET A HEARING ON THAT CLAIM.

THAT WAS THE PROBLEM.

THE ALLEGATIONS WERE, CERTAINLY AS OF THE DAY BEFORE

DR. WRIGHT'S TESTIMONY, THE STATE -- THERE WAS AN INDICATION THAT THERE WAS SOMETHING GOING ON WITH DR. WRIGHT BECAUSE --

>> I DON'T UNDERSTAND WHY THERE WAS NO ATTEMPTED.

I THINK IT IS PROBABLY -- GOES BACK TO JUSTICE PARIENTE'S ORIGINAL QUESTION, YOU KNOW, PEOPLE ARE NOT SHY ABOUT ASKING QUESTIONS THAT THEN, YOU KNOW,

THAT IS BEYOND THE SCOPE OF WHAT THIS REMAND OR THIS EVIDENTIARY HEARING IS SUPPOSED TO BE ABOUT. BUT THERE WAS NOTHING IN HERE THAT I COULD SEE, THAT THERE WAS ANY ATTEMPT TO SAY THE STATE KNEW THIS, RIGHT AFTER THE DIRECT EXAMINATION.

FOR EXAMPLE.

AND NEVER TOLD US THAT HE WAS GOING TO TESTIFY TO SOMETHING DIFFERENT ON CROSS-EXAMINATION, AND SO, I --

>> MR. --

>> IT IS DISTURBING TO ME THERE WAS NO ATTEMPT TO MAKE THAT KIND OF --

>> MR. LLORENTE, HE INDICATED THAT HE, LEARNED OF THIS, AS DR. WRIGHT WAS TESTIFYING.

>> LET ME MAKE SURE WE ARE -- WHAT WE'LL FOCUS ON, HAVE YOU CONCEDED THAT -- NOT CONCEDED BUT THERE IS REALLY NOT A GOOD ARGUMENT THAT THE PENALTY PHASE IS -- THERE WAS SOMETHING UNDERMINED ABOUT THE COMPETENCE OF THE PENALTY PHASE BASED ON THAT AND DO YOU WANT TO US FOCUS ON THE GUILT PHASE?

I NEED TO KNOW THAT --

>> THE INFORMATION WAS BROUGHT OUT TO THE JURIES RESENTENCING, OBVIOUSLY.

MY CENTRAL CONCERN WITH THE RESENTENCING HAS TO THIS IS THE FAILURE TO MAKE A RICHARDSON INQUIRY AND POSSIBLY MOVE FOR SOME KIND OF SANCTIONS.

>> WHAT WOULD THE SANCTIONS HAVE BEEN.

>> STRIKING THE WITNESS FOR EXAMPLE IS AN AVAILABLE SANCTION.

>> BUT THEN STRIKING HIS TESTIMONY FROM THE FIRST TRIAL?

>> YES, STRIKING THE WITNESS.

I MEAN, THAT'S REALLY THE --

[INAUDIBLE] MY MAIN FOCUS IS AS TO THE CONVICTION, AND WHAT'S ALSO IMPORTANT IS NOT ONLY LIKE

I SAID EARLIER WE HAVE THIS PRIOR SUPPRESSED BUS TICKET, BUT THERE WERE ALSO ADDITIONAL ALLEGATIONS MADE IN THE 30 AND 50 REGARDING SOME NEW BRADY VIOLATIONS THAT I DISCOVERED ALSO RELATING BACK TO THE ORIGINAL CONVICTION.

THOSE, ALSO, WE DID NOT GET A HEARING ON, SO YOU HAVE THE CUMULATIVE RESPECT OF THE HEARING, AND I DISAGREE --

>> LET ME ASK YOU A QUESTION ABOUT THAT.

>> SURE.

>> YOU'RE INTO YOUR REBUTTAL TIME, AND I DON'T WANT TO TAKE UP A BUNCH OF TIME.

AT THE END OF THE EVIDENTIARY HEARING ON THE POSTCONVICTION MOTION, WAS THERE ARGUMENT MADE TO THE TRIAL COURT JUDGE AT THE HEARING?

>> I DON'T BELIEVE SO.

WE HAD --

>> DID YOU -- SO THERE WAS NO ARGUMENT MADE TO THE TRIAL COURT JUDGE AT THE END OF THE HEARING?

>> I DON'T BELIEVE SO.

>> WAS THERE A WRITTEN ARGUMENT SUBMITTED TO THE COURT AFTER THE HEARING?

>> YES.

>> OKAY.

AND WAS THERE ANY REFERENCE IN THE WRITTEN ARGUMENTS SUBMITTED TO THE TRIAL COURT AFTER THE EVIDENTIARY HEARING ABOUT THE LIMITED NATURE OF THE EVIDENTIARY HEARING?

>> YES.

I BELIEVE IN MY MEMO I DID INDICATE THAT, AND THAT'S SOMETHING THAT THE COURT ADDRESSED IN THE ORDER SAYING, YOU KNOW, THE DEFENDANT ARGUES THAT THE COURT HAD LIMITED THE HEARING, BUT THEN THE COURT MAKES THIS CONCLUSION --

>> COURT DISAGREES WITH YOU.

>> CORRECT.

CORRECT.

AND SO I DID WHAT I COULD.

YOU KNOW, I'VE DONE THIS FOR A

LONG TIME, AND I CERTAINLY, YOU KNOW, I FOLLOW WHAT THE COURT SAYS.

YOU KNOW, IF I WERE TO ALL OF A SUDDEN START PARADING IN -- BECAUSE THE WITNESSES THAT WOULD HAVE BEEN NECESSARY FOR A BRADY ALLEGATION WOULD HAVE BEEN A LOT DIFFERENT THAN JUST THE LIMITED HEARING.

AND SO THAT WOULD HAVE, OBVIOUSLY, ALTERED THE SCOPE OF MY PREPARATION AND THE STATE'S PREPARATION.

>> DID YOU ASK FOR -- BECAUSE, I MEAN, AS FAR AS DISCOVERY, DID YOU ASK THIS COURT AT ANY TIME BEFORE THE HEARING THAT YOU WANTED TO, IN LIGHT OF THIS DR. WRIGHT THING BEING A BIG ISSUE, THAT YOU WANTED TO REDEPOSE DR. WRIGHT OR THE PROSECUTOR?

>> NO, WE DID NOT ASK TO --

>> IT SEEMS TO ME IN THIS ATTEMPT TO TRY TO GET, YOU KNOW, HAVE THIS DONE ONE -- DONE CORRECTLY THAT PRETRIAL OR ANYONE DISCOVERY'S ALLOWED. IS THAT NOT AS A PRACTICAL MATTER, IS THAT SOMETHING UNDER THE RULES YOU FEEL YOU DO HAVE THE ABILITY TO ASK FOR?

>> I KNOW THERE'S AN ABILITY TO --

>> YOU SEE WHY OUR RELUCTANCE HERE?

>> SURE.

>> -- QUICKLY OUT OF TIME, BUT WE DO ENCOURAGE AS MUCH TO BE DONE THE FIRST TIME, AND SO IT'S FRUSTRATING.

AND, AGAIN, IT JUST SEEMS TO ME THERE'S A MISSING LINK HERE, AND YET I'M NOT SURE WHOSE RESPONSIBILITY IT IS FOR THE MISSING LINK.

>> WELL, AND JUST IN CLOSING I WANT TO REMIND THE COURT THAT THIS NEW RULE REQUIRES AN EVIDENTIARY HEARING ON ANY CLAIM THAT THE DEFENDANT ALLEGED REQUIRED FACTUAL DEVELOPMENT. THESE WERE THE CLAIMS THAT I

SPECIFICALLY WENT THROUGH IN GREAT DETAIL.

IT WAS THE STATE THAT OBJECTED TO A HEARING, AND IT WAS THE COURT THAT OBJECTED TO THE HEARING.

-- AT THE CASE MANAGEMENT HEARING TO WHAT I BELIEVE THE ALLEGATIONS WERE AND THAT SATISFIED THE PRETTY LENIENT CEILING IN TERMS OF WHAT, YOU KNOW, HOW TO GET AN EVIDENTIARY HEARING IF ONE IS PRESUMED TO OCCUR.

WE HAD A HEARING, UNFORTUNATELY, WE WEREN'T ALLOWED TO SUBMIT ANYTHING, ASK SO I SUBMIT ANY ERROR REALLY RESTS WITH THE TRIAL COURT, AND THIS CASE SHOULD BE REVERSED.

THANK YOU.

>> ALL RIGHT.

THANK YOU.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, CELIA TERENCE ON BEHALF OF THE STATE OF FLORIDA.

>> KEEP YOUR VOICE UP, PLEASE.

>> OKAY.

>> IF YOU COULD START US -- AND I THINK WE'RE GOING DOWN THE WRONG TRACK.

WE REALLY DO ENCOURAGE EVIDENTIARY HEARINGS, SO WE CAN DO IT ONE TIME AND NOT SEVERAL TIMES.

>> OF COURSE.

>> AND I KNOW THERE ARE SOME ISSUES RAISED ABOUT WHICH PARTS OF THE CLAIM COULD BE BROAD AND WHICH PARTS COULDN'T BE.

WHAT WAS, WHAT WAS LIMITED IN THE EVIDENTIARY HEARING?

WHAT WAS THE UNDERSTANDING AS TO WHAT THE EVIDENTIARY HEARING WAS TO COVER?

>> IN TERMS OF DR. WRIGHT.

>> YES.

>> OKAY.

THE TESTIMONY -- THE ISSUE OF --

>> AND, PLEASE, SPEAK UP A LITTLE.

>> OKAY.

IF YOU LOOK AT THE JUDGE'S ORDER

ON PAGE 325, SHE SAYS THE EVIDENTIARY HEARING IS GOING TO BE ABOUT -- SHE SAYS SOLELY ON THE SUB, THESE SUBISSUES RELATING TO DR. WRIGHT'S ALLEGED CHANGE IN TESTIMONY.

AND RIGHT BEFORE THAT ALL SHE DOES IS QUOTE FROM THE DEFENDANT'S MOTION ITSELF WHERE HE CLAIMS THAT COUNSEL WAS INEFFECTIVE FOR NOT MAKING AN OBJECTION, AND HE'S REFERRING TO THE BRADY ISSUE.

IF YOU READ THE MOTION WHERE SHE'S REFERENCING.

AND THE RICHARDSON HEARING. BUT MORE IMPORTANTLY, EVEN IF YOU WANT TO SAY THAT THERE MIGHT BE CONFUSION, THERE'S ABSOLUTELY NO CONFUSION ABOUT THE POINT THAT HE WAS ALSO GRANTED A HEARING ON HIS CLAIM OF NEWLY-DISCOVERED EVIDENCE AT THE GUILT PHASE.

SHE SAYS THAT IN THE ORDER -- >> WHICH PARAGRAPH OF THE ORDER IS THAT?

>> THAT'S ON PAGE 326 OF THE RECORD, THE SECOND TO LAST FULL PARAGRAPH.

"DEFENDANT HAS ALSO RAISED A NEWLY-DISCOVERED EVIDENCE CLAIM REGARDING DR. WRIGHT'S ALLEGED CHANGED TESTIMONY."

DEFENDANT'S MOTION PAGE 28, SHE REFERENCES.

"AS THIS COURT HAS GRANTED AN EVIDENTIARY HEARING SOLELY ON THE SUBISSUE INVOLVING DR. WRIGHT'S ALLEGED CHANGE IN TESTIMONY, THE NEWLY-DISCOVERED EVIDENCE CLAIM IS ASSUMED BY THE NECESSITY OF AN EVIDENTIARY HEARING."

SO AND IF YOU GO BACK TO PAGE 28 OF THE MOTION --

>> WHAT WAS IT THE STATE WAS TRYING TO LIMIT?

DID THE STATE TRY TO SAY, NO, YOU DON'T NEED AN EVIDENTIARY HEARING ON WHICH ISSUES?

>> THE -- MAINLY ON THE DR. FLEMING ISSUE, ON THE INEFFECTIVE ASSISTANCE TO

COUNSEL CLAIM WHICH THE COURT DID AGREE WITH THE STATE ON.

>> BY THE WAY, JUST AS AN ASIDE, BECAUSE WE DO -- AS MR. SCHERR SAID -- THE INTENT OF THE RULE IF THERE'S A MARGINAL BASIS FOR AN EVIDENTIARY HEARING.

>> CORRECT.

>> SO YOU'RE GOING TO HAVE THE LAWYER ON, HOW MUCH -- YOU'D ASKED HIM, WELL, DID YOU THINK IT WAS A GOOD IDEA TO PUT DR. FLEMING ON? INSTEAD OF US TRYING TO FUDGE AROUND WITH HOW IS THIS THE PROPER DENIAL, THERE'S STARTING TO BE A TENDENCY AGAIN TO NARROW THE SCOPE OF THESE EVIDENTIARY HEARINGS, AND IT'S JUST SO MUCH EASIER -- THE GUY'S ON THE STAND, JUST LET 'EM ASK THE QUESTIONS.

>> BUT THAT'S NOT THE LAW OR THE RULE UNLESS THIS COURT WANTS TO SAY THIS WITNESS IS GOING TO BE --

>> [INAUDIBLE]

WELL, THERE'S THE STRATEGIC ISSUE, WHY DID HE PUT DR. FLEMING ON THE STAND? DID THE GOOD OUTWEIGH THE BAD?

>> BUT THAT ACTUALLY -- THE REASON WHY IT WAS, THAT ISSUE WAS BARRED IS BECAUSE IT WAS ALREADY LOOKED AT ON DIRECT APPEAL, AND IT WAS CLEAR FROM THE TRANSCRIPT YOU COULD TELL WHY HE WAS PUTTING HER ON. THERE WAS A MOTION --

>> BUT WE DIDN'T, WE DECIDED THAT IT WAS APPROPRIATE TO CROSS-EXAMINE HER. WE DIDN'T MAKE THE DECISION NOR COULD WE ON DIRECT APPEAL WHETHER IT WAS EFFECTIVE STRATEGY TO PUT HER ON IF THIS NEGATIVE CRIMINAL BACKGROUND WAS GOING TO COME OUT.

>> NO, BUT ALSO BY THE SAME TOKEN WHAT CAME OUT ON DIRECT APPEAL AND AT THE RESENTENCING REGARDING HER WAS, OKAY, IF YOU PUT HER ON ABOUT HER -- EXCUSE

ME, I JUST LOST MY TRAIN OF THOUGHT.

IF YOU'RE GOING TO PUT HER ON REGARDING LLOYD DUEST'S REHABILITATIVE -- THE ISSUES REGARDING HIS LIFE IN PRISON, WE'RE GOING TO BE ABLE TO TALK ABOUT HIS, YOU KNOW, THE PRIOR HISTORY.

OKAY?

AND THEN ON DIRECT APPEAL THIS COURT NOT ONLY SAID THAT IT WAS RELEVANT, BUT OBVIOUSLY ANOTHER PART OF THAT IS WAS IT TOO PREJUDICIAL?

AND THEY ARGUED THAT NOT ONLY SHOULD IT NOT HAVE COME IN ANYWAY, BUT THERE'S A DUE PROCESS VIOLATION BECAUSE IT WAS TOO PREJUDICIAL, AND THIS COURT OBVIOUSLY FOUND THAT WASN'T THE CASE.

SO WHEN YOU GET TO AN INEFFECTIVE CLAIM, OKAY, THE FIRST PART WAS ABOUT THE STRATEGY --

>> WE DON'T MAKE A DECISION WHETHER IT WAS REASONABLE TO PUT HIM ON IN THE FIRST PLACE.

THAT'S THE QUESTION THAT WOULD HAVE BEEN DEVELOPED IN AN EVIDENTIARY HEARING.

>> BUT THIS COURT HAS ALSO SAID AFTER BRUNO IT HAS SAID IN RAWLINGS THAT ALTHOUGH, YES, THERE ARE TWO DISTINCT ISSUES, ONE IS THE ADMISSIBILITY OF EVIDENCE ON DIRECT APPEAL VERSUS AN INEFFECTIVE CLAIM, THERE ARE TWO DISTINCT ISSUES, BUT THIS COURT HAS ALSO SAID IN BOTH OF THOSE OPINIONS AND ESPECIALLY RAWLINGS, SINCE IT WAS AFTER BRUNO, IS THAT AS LONG AS WE'VE BEEN ABLE TO LOOK AT THE UNDERLYING ISSUE AT LEAST ONCE, YOU DON'T HAVE TO LOOK AT IT AGAIN.

>> WELL, MAYBE WE'LL HAVE TO CLARIFY THIS BECAUSE I THINK, YOU KNOW, I DON'T THINK THAT THIS WAS PROCEDURALLY BARRED IF THAT WAS WHAT WAS BEING ARGUED, BUT LET'S GET BACK TO

DR. WRIGHT.

>> OKAY.

>> DO WE KNOW WHEN THE STATE  
KNEW ABOUT THE CHANGE IN  
DR. WRIGHT'S TESTIMONY?

>> NO, WE DON'T, AND THE  
REASON --

>> AND IS IT TRUE THAT THE  
PROSECUTOR'S NOTES SHOW THAT AT  
LEAST AT SOME POINT BEFORE  
DR. WRIGHT WAS PUT ON THE STAND  
THAT DR. WRIGHT, WHO WAS A VERY  
SOPHISTICATED AND EXPERIENCED  
MEDICAL EXAMINER, WOULD HAVE  
GONE OVER HIS NEW TESTIMONY WITH  
THE STATE?

>> NO, AND I, I DON'T THINK YOU  
CAN GLEAN --

>> YOU ARE TELLING ME THAT  
AFTER -- WHAT WAS -- THE FIRST  
PENALTY PHASE WAS IN WHAT YEAR?

>> EXCUSE ME?

>> WHAT YEAR WAS THE FIRST --

>> 1983.

>> THE SECOND PENALTY PHASE?

>> 1998.

>> FIFTEEN YEARS.

ARE YOU TELLING ME WE WOULD  
THINK THE PROSECUTOR BEFORE  
DR. WRIGHT WENT ON THE STAND  
DIDN'T SIT DOWN WITH DR. WRIGHT  
TO REFRESH HIS RECOLLECTION AND  
GO OVER WHAT HIS PENALTY PHASE  
TESTIMONY WAS GOING TO BE?

>> TWO ANSWERS.

NUMBER ONE, DURING VOIR DIRE  
WHEN THE JUDGE WAS ASKING ABOUT  
THE SCHEDULING FOR THE UPCOMING  
HEARING, AND DR. WRIGHT'S NAME  
CAME UP.

THE PROSECUTOR SAID THAT HE'S  
GONNA TESTIFY THAT THE TIME OF  
DEATH WAS IN 5 MINUTES WHICH WAS  
CONSISTENT WITH WHAT HIS  
TESTIMONY WAS AT THE DEPOSITION.  
SO IF YOU WANT TO LOOK JUST AT  
THE RECORD, NO, THE STATE DID  
NOT KNOW THAT DR. WRIGHT WAS  
GOING TO CHANGE HIS TESTIMONY  
FROM 5 MINUTES BEING CONSCIOUS  
TO BETWEEN 5-15 MINUTES.

>> IT WASN'T ONLY THAT HE WOULD  
CHANGE HIS TESTIMONY AS TO WHERE

THE ATTACK TOOK PLACE.

>> NO, THAT'S NOT -- NO.

THAT'S A MISCHARACTERIZATION OF THE RECORD.

FIRST OF ALL, DR. WRIGHT ONLY TESTIFIED AT THE GUILT PHASE FIRST TIME AROUND, WELL, THE ONLY GUILT PHASE.

HE NEVER, NEVER TESTIFIED AS TO HOW LONG IT TOOK THE DEFENDANT TO DIE.

THE JURY NEVER HEARD THAT, AND THE REASON WAS BECAUSE THERE WAS AN ALIBI DEFENSE.

THE ISSUE, THE INTENT WAS NEVER CONTESTED AT THE GUILT PHASE.

HE PUT ON 11 WITNESSES TO SAY I WASN'T THERE, I WAS IN BOSTON.

THE ONLY TIME DR. WRIGHT TALKED ABOUT THE TIME OF DEATH WAS IN HIS DEPOSITION, AND IN HIS DEPOSITION HE SAID THAT THE DEFENDANT, EXCUSE ME, THE VICTIM WAS ALIVE ANYWHERE FROM 15 SECONDS TO 5 MINUTES.

AND ALSO IN THAT DEPOSITION, DR. WRIGHT DISCUSSED THE FACT THAT THIS VICTIM, HE WAS SURPRISED THAT THE VICTIM DIDN'T CALL 911 FOR HELP.

AND HE THOUGHT THAT WAS VERY UNUSUAL, THAT THE DEPOSITION IN AT LEAST FOUR SPOTS SAYS THAT.

NUMBER TWO, HE ALSO, IN THE DEPOSITION, TALKED ABOUT HE WAS ON HIS FEET.

NONE OF THE INJURIES WOULD HAVE INSTANTLY INCAPACITATED HIM, AND PROBABLY SINCE THIS MAN WAS A HOMOSEXUAL -- WE HAVE SEEN THIS BEFORE, THAT MANY TIMES THAT THEY DON'T LIKE TO CALL FOR HELP --

>> [INAUDIBLE] WITHIN 5 MINUTES, CORRECT?

>> CONSCIOUSNESS, RIGHT.

>> AND ALSO HE NEVER BEFORE THE SECOND PENALTY PHASE DID HE TALK ABOUT THERE BEING -- HE HAD TALKED ABOUT A SECOND ATTACK IN THE BATHROOM.

>> OKAY.

THAT'S THE OTHER THING.

THERE IS NOTHING --

>> [INAUDIBLE]

>> JUSTICE PARIENTE, THERE'S NOTHING IN THE GUILT PHASE THAT SAYS THERE WAS TWO SEPARATE ATTACKS.

>> WHERE IS THAT TESTIMONY?

>> THAT'S A GOOD QUESTION. I DON'T KNOW WHERE THAT TESTIMONY WAS.

AS A MATTER OF FACT, ON CROSS-EXAMINATION AT THE GUILT PHASE HE ASKS, A LARGE AMOUNT OF BLOOD WAS IN THE BATHROOM AND ON THE BED.

OKAY.

"COULD YOU TELL WHERE THE MAJORITY OF THE BLOWS OCCURRED?" AND HE SAID, "ALL COULD HAVE OCCURRED OR BEEN RECEIVED ON THE BED."

>> SO WHEN WE SAID IN OUR OPINION BACK IN 2003 DR. WRIGHT TESTIFIED AS TO THE MANNER OF THE VICTIM'S DEATH IN HIS 1983 TESTIMONY, HE TESTIFIED THE VICTIM WAS INITIALLY ATTACKED BOTH ON HIS BED AND IN THE BATHROOM AND DIED SOON AFTER, A FINAL BLOW IN THE BATHROOM, AND THAT THE DEATH WOULD HAVE OCCURRED 10-15 SECONDS, AND NO MORE THAN 5 MINUTES, THAT'S INCORRECT?

AND THEY'VE NEVER FILED ANYTHING TO CORRECT -- YOU'RE NOW SAYING IS INCORRECT TESTIMONY IN OUR 2003 OPINION?

>> THAT'S RIGHT.

THERE IS NOTHING --

>> [INAUDIBLE].

EXCUSE ME.

THE STATE HAS BEEN THE FINAL -- 2003 YOU'RE SAYING THAT WHAT IS IN THAT OPINION IS NOT CORRECT?

>> WHAT I'M SAYING, JUDGE --

>> IS THAT CORRECT?

YOU'RE SAYING THAT'S NOT CORRECT?

>> I'M SAYING IT'S NOT ENTIRELY CORRECT BECAUSE AT THE GUILT PHASE, WHAT CAME OUT AT THE GUILT PHASE WAS THAT HE COULD NOT TELL WHERE THE MAJORITY OF THE BLOWS OCCURRED, AND THEN HE

SAID, AS A MATTER OF FACT, THEY COULD HAVE BEEN ALL RECEIVED ON THE BED, AND THEN HE WENT INTO THE BATHROOM TO CLEAN HIMSELF UP.

THAT'S WHAT CAME OUT AT THE GUILT PHASE OF THE TRIAL. AND ALSO, YOUR HONOR, IN TERMS OF -- AGAIN, I'VE GOT TO GO BACK TO WHAT HE WAS GRANTED A HEARING ON.

HE WAS GRANTED A HEARING ON A CLAIM OF NEWLY-DISCOVERED EVIDENCE FOR THE GUILT PHASE. SO WHETHER IT WAS INCLUDED OR NOT, THE POINT IS THE UNDERLYING FACTS IS AT ISSUE.

OKAY, WHEN DID HE CHANGE HIS TESTIMONY, AND WHEN DID THE STATE KNOW THAT? THAT WOULD BE, THAT WOULD BE A RELEVANT CONSIDERATION FOR WHETHER THE LEGAL CLAIM WAS A BRADY --

>> -- EVIDENCE CLAIM WOULDN'T IT BE MORE PERTINENT TO DEMONSTRATE IT WAS NEWLY-DISCOVERED EVIDENCE?

>> RIGHT.

SO MY POINT IS HE GOT A HEARING ON THAT, AND THAT HEARING -->> BUT THAT MAY NOT NECESSARILY INCLUDE WHEN THE STATE, A NEWLY-DISCOVERED EVIDENCE CLAIM, WOULDN'T YOU HAVE TO DEMONSTRATE THE EVIDENCE WAS NOT AVAILABLE TO YOU AT THE TIME OF TRIAL AND WHEN YOU HAD IT --

>> YES.

>> THIS IS THE DEFENDANT.

>> RIGHT.

>> WHEN THE DEFENDANT HAD IT SO WE WOULD KNOW WHETHER OR NOT HE HAD BROUGHT IT IN A TIMELY FASHION.

>> YES.

>> DOES THAT ENCOMPASS NECESSARILY WHEN THE STATE KNEW ABOUT THIS --

>> OF COURSE IT WOULD.

>> -- BRAND NEW AND DISCOVERED EVIDENCE?

>> OF COURSE IT WOULD.

WHY WOULDN'T -- BECAUSE FOR

DISCOVERED EVIDENCE YOU'VE GOT TO SHOW WITH DUE DILIGENCE YOU WOULD NOT HAVE DISCOVERY. SO DON'T YOU THINK YOU'D WANT TO START BY ASKING THE MAIN MAN, DR. WRIGHT, OKAY, WHEN DID YOU CHANGE YOUR TESTIMONY? DID YOU LET THE STATE KNOW? DID YOU SAY ANYTHING TO --

>> MAYBE, MAYBE NOT.

I MEAN, AS LONG AS THE DEFENDANT CAN DEMONSTRATE THAT HE DID NOT HAVE THAT INFORMATION AND HE RECEIVED THAT INFORMATION WITHIN THE REQUISITE TIME PERIOD IN ORDER TO BRING HIS NEWLY-DISCOVERED EVIDENCE.

>> OKAY.

AND THEN THE PERSON TO ANSWER THAT QUESTION WOULD HAVE BEEN EVAN BARON, GUILT PHASE COUNSEL. THAT'S WHO HE SHOULD HAVE OR PUT ON AT THE EVIDENTIARY HEARING. MR. BARON, DID YOU SEE THE DIFFERENCE BETWEEN DR. WRIGHT'S DEPOSITION TESTIMONY VERSUS, YOU KNOW, AND THEN THE RESENTENCING?

>> BUT THE RESENTENCING IS WHEN --

>> IT CAME OUT.

>> MR. LLORENTE, THAT'S WHEN IT CAME OUT.

I THINK THAT ON THIS ISSUE, LET'S ASSUME IT WAS NEWLY-DISCOVERED EVIDENCE. I THOUGHT WHAT YOU WERE DOING IS GOING BACK TO IT COULD NOT PRODUCE A POSSIBILITY, A PROBABILITY OF ACQUITTAL.

>> OF COURSE NOT.

>> LET'S MAYBE, SINCE WE'RE THROWING OUT A WHOLE LOT OF STUFF HERE, LET'S GO BACK JUST TO THAT POINT SO I CAN STAY FOCUSSED AND THAT YOU CAN HELP ME.

>> OKAY.

>> AFTER THE GUILT PHASE, GIVE US YOUR BEST ARGUMENT AS TO WHY IT DOES NOT MEET THE SECOND PRONG OF JONES?

>> FOR THE SAME REASON WHY THIS COURT IN THE RESENTENCING OPINION TALKED ABOUT THE CCP AND

EVEN WITH THE NEW EVIDENCE, THIS COURT ALTHOUGH JUDGE LEEBO DIDN'T FIND CCF, THIS COURT SAID THERE WAS CLEARLY AMPLE EVIDENCE IN PREMEDITATION.

I MEAN, MR. DUEST KILLED MR. POPE BY STABBING HIM 12 TIMES WHICH INCLUDED HIS HEAD, HIS HEART, HIS UNDERARMS, HIS LUNGS.

THERE WERE DEFENSIVE WOUNDS. HE TOLD A PERSON THAT HE WAS GOING TO ROLL A FAG WHEN HE GOT TO FT. LAUDERDALE.

WITHIN TWO DAYS HE GOES TO A BAR, PICKS UP MR. POPE, AND BEFORE HE GOES BACK TO MR. POPE'S APARTMENT, HE STOPS AT HIS OWN APARTMENT AND GETS A KNIFE.

AND THEN GOES BACK TO THE VICTIM'S HOME, STABS THE VICTIM 12 TIMES, LEAVES HIM FOR DEAD, DOESN'T WAIT AROUND FOR THE MAN TO DIE, DOESN'T HELP HIM, TAKES HIS CAR AND HIS JEWELRY.

>> IT'S DEFINITELY, I MEAN, DR. WRIGHT NEVER TESTIFIED THESE WOUNDS WEREN'T LIFE THREATENING.

>> NO, NO.

AS A MATTER OF FACT, ESPECIALLY THE ONES TO THE TEMPLE. HE SAID ALTHOUGH THEY DID NOT INSTANTANEOUSLY INCAPACITATE, WITHIN 5 MINUTES OF NOT RECEIVING HELP, THEY WERE FATAL.

>> OKAY.

NOW ON THE ISSUE AS TO THE PENALTY PHASE AND WHETHER IT GO ON THE ONE THAT LET'S ASSUME THAT MR. LLORENTE SHOULD HAVE ASKED FOR A RICHARDSON HEARING. I HAD A LITTLE TROUBLE.

WE HAVEN'T EVER DONE A RICHARDSON FAILURE TO REJECT WITH AN INEFFECTIVE ASSISTANCE CLAIM.

TELL ME HOW YOU ANALYZE THAT. LET'S ASSUME THAT THE STATE KNEW ABOUT IT BEFORE --

>> OKAY.

>> -- TRIAL STARTED AND MAYBE UNDER SCIPIO THEY SHOULD HAVE ADVISED THE DEFENDANT OF THERE

IS A CHANGE.

>> OKAY.

>> TELL ME WHAT, YOU KNOW, WHY SHOULDN'T HAVE RICHARDSON HEARING BEEN REQUESTED BY --

>> WELL, AS MR. LLORENTE SAID AT THE EVIDENTIARY HEARING UNDER HIS EXPERIENCE THAT THE WITNESS WOULDN'T HAVE BEEN STRICKEN.

>> BUT, YOU KNOW, YOU DON'T ASK --

>> BUT WHY WOULD YOU WANT, BUT WHY WOULD YOU WANT DR. WRIGHT'S TESTIMONY TO BE STRICKEN SINCE THEN YOU RAN WITH IT AND TRIED TO MAKE IT INTO A CHALLENGE TO HAC AND CCP?

>> I DON'T KNOW.

I GUESS I'M TRYING TO FIND OUT BECAUSE MR. SCHER IS SAYING TODAY, NO, IT MAKES HAC WORSE, WHICH I AGREE.

HE SUFFERS A LONGER PERIOD OF TIME, SO YOU'VE GOT -- AND LEAVING SOMEBODY FOR DEAD, YOU KNOW, WHO'S DYING BUT NOT DEAD, NOT EVEN MAYBE UNCONSCIOUS IS EVEN MORE HEINOUS, ATROCIOUS, AND CRUEL.

SO I'M TRYING TO SEE HOW THAT REALLY HELPS THE DEFENSE.

>> WELL, AGAIN, HE ARGUED AS A MITIGATOR BUT FOR THE FACT HE DIDN'T CALL 911, HE WOULD BE ALIVE TODAY.

AND AS A MATTER OF FACT, IF YOU LOOK AT THE OPENING ARGUMENT OF MR. LLORENTE AT THE RESENTENCING ON PAGE 329 -- AND THIS SHOWS, IN OUR OPINION, THAT THIS WASN'T NEWLY-DISCOVERED EVIDENCE THAT AT THE DEPOSITION DR. WRIGHT SAID THIS, HE SAYS,

"MR. CAVANAUGH POINTED OUT ALTHOUGH HIS TESTIMONY AS HE POINTED OUT WILL SHOW YOU THAT HE LIVED" -- MEANING THE VICTIM -- "FOR SEVERAL MINUTES. HE'LL TRY TO SHOW YOU THAT FOR THE PURPOSES OF AGGRAVATING CIRCUMSTANCES.

WHAT HE DID NOT TELL YOU AND HE DID NOT SHOW, AT NO TIME DID THE

VICTIM, MR. POPE, ATTEMPT TO CALL RESCUE, ATTEMPT TO CALL 911, ATTEMPT TO CALL THE POLICE, AND THAT IS SOMETHING YOU MAY CONSIDER."

>> AS TO WHAT?

WHAT WOULD YOU CONSIDER IT AS TO?

>> AGAIN, BUT FOR -- HE'S TRYING TO SAY THAT HE DIDN'T REALLY INTEND TO KILL THIS VICTIM --

>> THIS IS NOW IN THE PENALTY PHASE.

>> YES.

>> THAT DOESN'T HELP IN THE PENALTY PHASE.

YOU'VE ALREADY GOT A CONVICTION FOR FIRST-DEGREE MURDER.

>> OKAY.

YOU'RE ASKING ME WHY MR. LLORENTE WOULD NOT HAVE ASKED FOR A RICHARDSON HEARING, AND I'M TRYING TO SAY THAT BECAUSE DR. WRIGHT, IN HIS OPINION, HELPED HIM BECAUSE HE'S TRYING TO SHOW, GOSH, THIS MAN LIVED.

THIS MAN WAS CONSCIOUS FOR AT LEAST 15 MINUTES.

HE WAS TRYING TO HELP HIMSELF. OBVIOUSLY, HE DIDN'T APPRECIATE THE GRAVITY OF HIS WOUNDS.

IF HE HAD JUST CALLED 911, HE WOULD BE ALIVE TODAY.

THAT'S WHAT, THAT'S WHAT THE MITIGATION WAS.

NOW, WHETHER YOU SAY, WELL, THAT DIDN'T REALLY GO TO HAC, IT CERTAINLY IN HIS MIND WENT TO CCP, AND IT'S JUST A NONSTATUTORY MITIGATOR.

OH, MY GOD, HE DIDN'T REALLY MEAN TO KILL THIS GUY.

HE LEFT HIM ALIVE, HE LEFT HIM CONSCIOUS SITTING, TRYING TO TEND TO HIS WOUNDS.

THAT'S WHAT THE ARGUMENT WAS AT THE PENALTY PHASE.

AND MR. LLORENTE WAS ON THE STAND.

HE ASKED HIM, AND MR. LLORENTE SAID I'VE NEVER SEEN A COURT FOR A REMEDY STRIKE A WITNESS'S TESTIMONY, AND HE WAS OBVIOUSLY

VERY PREPARED FOR IT.  
I MEAN, HE CROSS-EXAMINED  
DR. WRIGHT ON THIS EXTENSIVELY.  
NOW, IN TERMS OF HOW THIS  
AFFECTS THE GUILT PHASE, AGAIN,  
ALL HE HAD TO DO SINCE HE GOT A  
HEARING ON THIS WAS PUT  
MR. BARON ON THE STAND AND ASK  
MR. BARON, DID YOU KNOW ABOUT  
THIS?  
WOULD THIS CHANGED YOUR DEFENSE  
STRATEGY?  
YOU'VE GOT TO REMEMBER, THE  
DEFENSE STRATEGY WAS I DIDN'T DO  
IT.  
THEY DID NOT CONTEST THE  
PREMEDITATION TO THE EXTENT THAT  
THIS CASE, THAT THERE WAS A LACK  
OF INTENT FOR FIRST-DEGREE  
MURDER.  
THEY DIDN'T TOUCH THAT.  
DR. WRIGHT NEVER, NEVER  
TESTIFIED TO THAT AT THE GUILT  
PHASE, AND NOBODY ASKED HIM  
ANYTHING ABOUT THAT.  
IT'S BECAUSE THE PENALTY, GUILT  
PHASE DEFENSE WAS I DIDN'T DO  
IT.

>> AND WITH THAT, YOU HAVE USED  
ALL OF YOUR TIME.  
THANK YOU VERY MUCH FOR YOUR  
ARGUMENT.

>> WE ASK THAT THIS COURT UPHOLD  
THE DENIAL OF POSTCONVICTION  
RELIEF ON ALL CLAIMS.  
THANK YOU.

>> JUST A FEW POINTS.  
AS TO THE ISSUE, JUSTICE  
PARIENTE, YOU WERE DISCUSSING  
WITH MS. TERENCE, THE COURT'S  
DIRECT APPEAL IN 1985 ALSO  
REFERS TO THE FACT THAT THE  
VICTIM RECEIVED 11 STAB WOUNDS,  
SO THAT'S CLEARLY --  
>> NOT THE OPINION, BUT HAVE YOU  
LOOKED AT TRANSCRIPTS?  
BECAUSE WE OUGHT NOT BE AT THIS  
STAGE OF AN APPELLATE PROCEEDING  
AND THEN STILL NOT WORKING WITH  
THE CORRECT EVIDENCE.  
SO HAVE YOU HAD AN OPPORTUNITY  
TO GO BACK AND VERIFY THAT?

IS THAT IN THE RECORD?

IS THAT CORRECT?

IS IT INCORRECT?

>> I DON'T --

>> WHAT'S YOUR TAKE ON THIS?

>> OBVIOUSLY, I REVIEWED  
DR. WRIGHT'S TESTIMONY RIGHT NOW  
SPECIFICALLY IN TERMS OF WHAT HE  
SAID.

OBVIOUSLY HE TESTIFIED, HIS  
TESTIMONY WOULD BE IN THE  
RECORD.

>> WELL, IT IS WHAT IT IS, BUT  
YOU DO NOT HAVE A RECOLLECTION  
AS YOU STAND HERE --

>> CORRECT.

THAT'S CORRECT.

BUT CERTAINLY THE STATE IS NOT  
SHY OF POINTING OUT THINGS --

>> DID YOU HAVE AN OPPORTUNITY  
TO RE-EXAMINE HIS DEPOSITION?

DID HE HAVE --

>> YES.

THE DEPOSITION IS IN THE RECORD.

>> THAT KIND OF INFORMATION IN  
HIS DEPOSITION?

>> I DIDN'T FOCUS ON THAT  
PARTICULAR ASPECT, SO HIS  
DEPOSITION'S IN THE RECORD.

I DON'T -- I CAN'T TELL YOU  
HONESTLY ONE WAY OR THE OTHER,  
BUT OBVIOUSLY, THAT INFORMATION  
CAME FROM SOMEWHERE.

HE WAS THE ONLY PERSON TO  
TESTIFY TO THE GUILT PHASE AS TO  
HOW THE MURDER OCCURRED.

>> THIS IS WHAT WE'RE ALL  
TALKING ABOUT.

IT SEEMS TO ME, I MEAN, THIS IS  
THE ESSENCE OF THIS CASE BECAUSE  
YOU'RE ASSERTING THAT THERE WAS  
CHANGED TESTIMONY AND THAT WAS  
WITHHELD, AND YOU'RE RELYING  
UPON NOT THE TESTIMONY, BUT WHAT  
WE STATE IN OPINION.

>> I'M NOT THE ONLY ONE  
ASSERTING.

DR. WRIGHT HIMSELF TESTIFIED AT  
THE SENTENCING THAT HE  
ACKNOWLEDGED HIS TESTIMONY WAS  
VERY DIFFERENT.

>> THAT'S WHAT HE SAID, IT WAS  
DIFFERENT AS TO THE LENGTH OF  
TIME.

WE'LL GET THIS STRAIGHT.  
I THOUGHT, YOU KNOW, IT'S HARD  
FOR ME TO BELIEVE, BUT IT'S  
POSSIBLE THAT WE MADE, DID IT  
WRONG IN '83 AND THEN 2003 AND  
NOBODY'S EVER POINTED IT OUT  
THAT WE MADE --

>> I DON'T BELIEVE SO, BUT IN  
ANY EVENT, JUST A FEW  
PROCEDURAL -- I HAVE A MINUTE  
LEFT.

>> YOU ARE OUT OF TIME.  
YOU REALLY NEED TO WRAP UP.

>> OH, I'M SORRY.  
WE DID NOT GET A HEARING ON  
THE --

>> LET ME COME BACK.  
I WANT YOU TO TAKE ONE MORE SHOT  
AT EXPLAINING TO ME WHY THE  
ORDER ON THE CASE MANAGEMENT  
DIDN'T PUT YOU ON EXPLICIT  
NOTICE THAT THE COURT WAS  
GRANTING YOU AN EVIDENTIARY  
HEARING ON ALL OF THAT SUBCLAIM  
INCLUDING THE BRADY ASPECT OF  
IT?

THAT IS THAT I'VE BEEN READING  
AND REREADING, YOU KNOW, THAT  
ORDER, AND CLEARLY IN THAT ORDER  
THE TRIAL COURT HAS SUMMARILY  
DENIED TWO OF THE THREE  
SUBCLAIMS IN CLAIM 3.

THAT'S CONFUSING ALL BY ITSELF.  
BUT THE COURT HAS CLEARLY NOT  
RESOLVED ANYTHING ABOUT  
DR. WRIGHT'S ALLEGED CHANGE IN  
TESTIMONY.

>> AS TO THE RESENTENCING.

>> SO I READ THAT OVER AND OVER  
AGAIN.

SINCE ONLY THE OTHER TWO CLAIMS  
TOTALLY UNRELATED TO  
DR. WRIGHT'S CHANGE IN TESTIMONY  
WERE SUMMARILY DENIED THERE,  
THAT YOU HAVE BEEN GRANTED AN  
EVIDENTIARY HEARING THEN ON THE  
OTHER CLAIM THAT REMAINS.

>> OKAY.

>> AND IT'S ONLY AFTER THE  
EVIDENTIARY HEARING THAT THE  
TRIAL COURT RESOLVES THAT.  
SO WHY DIDN'T THAT PUT YOU ON  
NOTICE?

>> OKAY.

IF YOU LOOK ON PAGE 5 OF THE ORDER, THE FIRST REFERENCE TO AN EVIDENTIARY HEARING BEING GRANTED IS IN THE FIRST FULL PARAGRAPH AFTER THE COURT DECIDES THAT THE ISSUE REGARDING DR. WRIGHT IS NOT PROCEDURALLY BARRED WHICH IS WHAT THE STATE WAS URGING.

THE LAST TWO SENTENCES THE JUDGE SAYS IT APPEARS FOR REVIEW IN THAT PARTICULAR TRANSCRIPT. COUNSEL DO NOT REQUEST A RICHARDSON HEARING, THERE ARE THE COURT FIND DEFENDANT'S ARGUMENT WAS COUNSEL WAS ALLEGEDLY INEFFECTIVE SOLELY ON THE SUBISSUES RELATING TO DR. WRIGHT'S ALLEGED CHANGE IN TESTIMONY.

NOW --

>> YEAH.

BUT THEN ON THE NEXT --

>> NOW --

>> THEN HE GOES ON, TALKS ABOUT THAT THE GARFIELD MEMO --

>> CORRECT.

>> -- NOT GIVING ONE ON THAT.

>> CORRECT.

>> THEY'RE NOT GIVING ONE ON SCHIFFLET, THAT'S A POLYGRAPH.

>> RIGHT.

>> AND THEY'RE NOT GIVING ONE ON CUMULATIVE EXCEPT AS IT RELATES TO THE CHANGE IN DR. WRIGHT'S TESTIMONY.

>> CORRECT.

>> AND THEN SIGNIFICANTLY THE NEWLY-DISCOVERED EVIDENCE CLAIM, THE COURT IS GRANTED A HEARING SOLELY ON THE SUBISSUE INVOLVING THE ALLEGED CLAIM, THE CLAIM IS SUBSUMED --

>> CORRECT.

>> -- BY NECESSITY FOR EVIDENTIARY HEARING.

>> CORRECT.

>> SHE NEVER SAYS, AND YOU CAN'T HAVE ONE ON THIS PART OF YOUR CLAIM ABOUT WRIGHT.

>> NO, BUT THEN, YOUR HONOR, IF YOU FLIP TO THE LAST PAGE OF THE ORDER, ORDER AND A JUDGE THIS

HAS TO CLAIM 3, THE ISSUE RAISED REGARDING THE CHANGE IN TESTIMONY REQUIRES AN EVIDENTIARY HEARING. THE REMAINDER OF THE SUBCLAIMS IN CLAIM 3 ARE DENIED.

>> WHAT'S IN SCHIFFLET --

>> AND ALL OF THE GUILT PHASE ISSUES.

AS SET FORTH ABOVE, THIS COURT -- UNTIL AFTER THE HEARING.

FOR FURTHER CLARIFICATION, THE EVIDENTIARY HEARING, AS GRANTED, IS ON THE SOLE ISSUE OF -- AND THIS IS IN BOLD -- ON THE SOLE ISSUE OF COUNSEL'S ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL AS IT RELATED TO DR. WRIGHT'S CHANGE IN TESTIMONY.

AND THAT'S IN BOLD, AND THAT'S THE LAST SENTENCE OF THE ORDER. SO, YOU KNOW, I'VE DONE A LOT OF THESE HEARING, AND IF I CAN SEE A WAY TO PRESENT ALL OF MY CLAIMS AT A HEARING, THEN THEN I WILL CERTAINLY DO SO.

AND I DIDN'T BELIEVE, YOU KNOW, AGAIN, THIS WOULD HAVE BEEN AN ENTIRELY DIFFERENT HEARING IN PREPARATION FOR A HEARING.

>> AGAIN, YOU HAVE GONE WELL OVER YOUR TIME.

>> THANK YOU.

>> THANK YOU VERY MUCH FOR YOUR ARGUMENT.

>> THANK YOU.

>> THE COURT WILL BE IN RECESS FOR 10 MINUTES.

>> PLEASE RISE.